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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re K.W., a Person Coming Under the Juvenile
Court Law.

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

OMAR C.,

Defendant and Appellant.

F071073

(Super. Ct. No. JD131248-00)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Kern County. Peter A.
Warmerdam, Juvenile Court Referee.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and
Appellant.

Theresa A. Goldner, County Counsel, and Thomas G. Morgan, Deputy County
Counsel, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Franson, J. and Smith, J.

Appellant Omar C. appeals from the juvenile court's order terminating his parental rights as to his two-year-old daughter K.W. Omar contends we must reverse the order because the juvenile court did not comply with the notice requirements of the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.). We reverse the order terminating parental rights and remand for the limited purpose of ensuring compliance with the ICWA notice provisions.

PROCEDURAL AND FACTUAL SUMMARY

These dependency proceedings were initiated in August 2013 when the Kern County Department of Human Services (department) took then five-month-old K.W. into protective custody after her mother, Alaina, was arrested for possession of narcotic paraphernalia and child endangerment. At the time, Omar was a defendant in a jury trial, charged with attempted premeditated murder and other related crimes. The department placed K.W. in foster care.

On August 27, 2013, the juvenile court convened the detention hearing. Alaina personally appeared but Omar did not. Alaina executed a Parental Notification of Indian Status form (ICWA-020), indicating that to her knowledge she did not have any Indian ancestry. The court found, as to Alaina, that the ICWA did not apply. The court continued the detention hearing so that Omar's attorney could contact him.

On August 29, 2013, a social worker from the department met with Omar at the detention facility. During their conversation, Omar stated that he may have Apache and Cota Indian ancestry.

On September 4, 2013, Omar appeared in custody at the continued detention hearing. On that same date, Omar signed an ICWA-020 form, indicating he did not have Indian ancestry as far as he knew. The juvenile court ordered K.W. detained and found that the ICWA did not apply.

In January 2014, the juvenile court exercised its dependency jurisdiction over K.W. and granted Alaina six months of reunification services. By this time, K.W. had

been placed with her maternal great-aunt. Also, Omar had been convicted and sentenced to 29 years in prison. Consequently, the juvenile court denied him reunification services.

In July 2014, the juvenile court conducted the six-month review hearing, terminated Alaina's reunification services and set a Welfare & Institutions Code section 366.26¹ hearing. Alaina did not appear at the hearing and her whereabouts subsequently became unknown.

In its report for the section 366.26 hearing, the department informed the juvenile court that K.W. had no known Native American heritage and that her maternal great-aunt was interested in adopting her. The department recommended the juvenile court free K.W. for adoption.

In February 2015, at the section 366.26 hearing, the juvenile court found that K.W. was likely to be adopted and terminated Omar and Alaina's parental rights.

Omar appeared at all of the hearings referenced above except the initial detention hearing. In February 2014, he filed a notice of appeal (F068790) from the juvenile court's dispositional order and was granted leave under *In re Phoenix H.* (2009) 47 Cal.4th 835 to file a letter setting forth a good cause showing that an arguable legal issue existed. Omar did not file a letter and we dismissed his appeal. In September 2014, Omar filed an extraordinary writ petition (F069858) from the juvenile court's setting order (Cal. Rules of Court, rule 8.452) which we dismissed as facially inadequate. Omar did not raise the court's earlier ICWA finding in his writ petition.

Omar does not challenge the order terminating his parental rights. His sole contention on this appeal is that the juvenile court erred in finding that the ICWA did not apply without first providing notice to the Apache and Cota tribes. He argues the

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

juvenile court's error was prejudicial and requires a reversal of its order terminating his parental rights.

DISCUSSION

ICWA provides that “[i]n any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention.” (25 U.S.C. § 1912.) “The ICWA is designed to protect the interests of Indian children, and to promote the stability and security of Indian tribes and families. It sets forth the manner in which a tribe may obtain jurisdiction over proceedings involving the custody of an Indian child, and the manner in which a tribe may intervene in state court proceedings involving child custody. When the dependency court has reason to believe a child is an Indian child within the meaning of [ICWA], notice on a prescribed form must be given to the proper tribe or to the Bureau of Indian Affairs, and the notice must be sent by registered mail, return receipt requested.” (*In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 906.)

Although ICWA itself does not expressly mandate that a court inquire into Indian ancestry, California imposes on county welfare departments and the juvenile court “an affirmative and continuing duty to inquire whether a child for whom a petition under Section [300 has been filed] is or may be an Indian child in all dependency proceedings ... if the child is at risk of entering foster care or is in foster care.” (§ 224.3, subd. (a).) A California court must order the parents to fill out a Parental Notification of Indian Status form (ICWA-020) at the first appearance by the parent in a section 300 proceeding. (Cal. Rules of Court, rules 5.480, 5.481(a)(2).)

Finally, “[t]o satisfy the notice provisions of the Act and to provide a proper record for the juvenile court and appellate courts, [a social service agency] should follow a two-step procedure. First, it should identify any possible tribal affiliations and send

proper notice to those entities, return receipt requested. [Citation.] Second, [the agency] should provide to the juvenile court a copy of the notice sent and the return receipt, as well as any correspondence received from the Indian entity relevant to the minor's status....” (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739-740, fn. 4.)

In this case, the social worker inquired of Omar whether he had Indian ancestry and he said he may have Apache or Cota Indian ancestry. However, a week later, Omar completed an ICWA-020 form, stating he did not have Indian ancestry as far as he knew. There is no evidence on the record that the department or the juvenile court inquired further to resolve this apparent discrepancy or made any attempt to comply with the notice provisions of the ICWA.

Respondent contends Omar forfeited the ICWA notice issue by not challenging it on appeal at the first opportunity. Therefore, respondent argues, the juvenile court's finding that the ICWA does not apply is final and not reviewable from the order terminating parental rights.

Ordinarily, we would conclude that Omar forfeited his right to raise a challenge to the juvenile court's finding that the ICWA did not apply. (*In re Pedro N.* (1995) 35 Cal.App.4th 183, 189-191.) We acknowledge, however, that the Supreme Court of California granted review on October 29, 2014, in S221263, *In re Isaiah W.* (2014) 228 Cal.App.4th 981 to consider whether a parent who failed to timely appeal the juvenile court's finding the ICWA does not apply is foreclosed from raising the issue of the juvenile court's noncompliance with ICWA notice requirements from the order terminating parental rights under section 366.26.

Since the California Supreme Court may decide that a parent's failure to timely appeal from the juvenile court's ICWA finding does not foreclose the parent from raising a claim of ICWA notice violation and because the failure of the juvenile court and the department in this case to clarify Omar's claim to Indian heritage may be inconsistent

with their continuing duty to inquire, we reverse out of an abundance of caution and remand with instructions.

DISPOSITION

The order of the juvenile court terminating Omar's parental rights to K.W. is reversed and the matter is remanded to the juvenile court with directions to order the department to provide proper notice of the proceedings under ICWA to the relevant tribes and to the Bureau of Indian Affairs and the U.S. Department of the Interior. If, after receiving notice, no tribe indicates that K.W. falls within the meaning of ICWA, then the juvenile court shall reinstate the order terminating Omar's parental rights. In all other respects, the order terminating parental rights is affirmed.